

FILED

MAY 29 2008

POSTED ON THE WEBSITE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re) Case No. 07-27879-D-11
) Docket Control No. [none]
OLGA LARREA NOGUES,)
)
Debtor.)

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM DECISION ON
PEREMPTORY CHALLENGE/MOTION FOR DISQUALIFICATION

On September 26, 2007, Olga Larrea Nogues (the "debtor") filed a voluntary chapter 11 petition.¹ No trustee has been appointed in the debtor's chapter 11 case, and the debtor is managing her affairs as a debtor-in-possession. On May 13, 2007, the debtor filed a Peremptory Challenge to Judge Robert S. Bardwil, a Notice of Motion/Motion for Peremptory Challenge to Judge Bardwil, and an Affidavit in Support of Peremptory Challenge to Judge Robert S. Bardwil (the "Affidavit in Support of Peremptory Challenge"). The court construes these pleadings as a motion to recuse or disqualify

¹Unless otherwise indicated, all Code, chapter, section and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date (October 17, 2005) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005).

1 the undersigned (the "Motion to Disqualify"). The court conducted
2 a hearing on the Motion to Disqualify on May 21, 2008,² and for the
3 reasons set forth below, the motion will be denied.

4
5 I. BACKGROUND

6 Some background on a number of related cases is necessary to
7 put the Motion to Disqualify, and the debtor's case, into context.
8 The debtor is the mother of Alma Triche-Winston, and Alma Triche-
9 Winston is the domestic partner of Charel Winston. Since December
10 2006, Charel Winston has filed three bankruptcy cases, all of which
11 have been dismissed, and all of which were pending before this
12 court.³ Alma Triche-Winston currently has a chapter 11 case
13 pending before this court, as Case No. 07-30155. All three of
14 Charel Winston's bankruptcy cases, Alma Triche-Winston's pending
15 chapter 11 case, and the debtor's case qualify as "related cases"
16 under Local Bankruptcy Rule 1015-1(b).

17 The debtor has listed on her Schedule A an ownership interest
18 in the real property commonly referred to 2000 Arroyo Vista Way, El
19

20 ² The debtor's motion fails to comply with Local Bankruptcy Rule
21 9014-1(f), which requires a minimum of 14 days' notice for hearing.
22 However, because there was no objection, the court held the hearing
on the Motion to Disqualify on less than 14 days' notice.

23 ³ Charel Winston filed her first bankruptcy case on December 11,
24 2006, as Case No. 06-25276. This case was filed as a skeletal chapter
25 13, and was automatically dismissed pursuant to § 521(i) for failure
26 to file documents within forty five days of the petition date. Almost
27 immediately thereafter, on January 30, 2007 Charel Winston filed her
28 second case, as Case No. 07-20593. This too was filed as a skeletal
chapter 13. This second case was dismissed on June 6, 2007 as a
result of Charel Winston's failure to obtain pre-petition credit
counseling. Within a week of the dismissal of her second case, Charel
Winston filed a third case, as Case No. 07-24447. This third case was
filed as a skeletal chapter 11 case and was dismissed on February 1,
2008.

1 Dorado Hills, California (the "Property"). Charel Winston listed
2 an ownership interest in the Property in each of her three
3 bankruptcies, and Alma Triche-Winston has listed an ownership
4 interest in the Property in her chapter 11 case. The debtor's
5 Schedule D indicates that Greenpoint Mortgage Funding, Inc.
6 ("Greenpoint") is secured by a deed of trust on the Property.

7 On October 22, 2007, Greenpoint filed a motion for relief from
8 stay in the debtor's case, which came on for hearing on November
9 28, 2007. At the relief from stay hearing the court asked the
10 debtor whether anyone had advised her to file bankruptcy, and how
11 she made the decision to file her chapter 11 case. In response,
12 the debtor indicated that her daughter, Alma Triche-Winston, and
13 Charel Winston advised her to file her chapter 11 case, and that
14 they prepared her schedules and statement of financial affairs.
15 The debtor further indicated, she did not closely review her
16 schedules and statement of financial affairs prior to signing them,
17 but rather assumed that Alma Triche-Winston, and Charel Winston had
18 accurately reported her financial affairs in these documents.

19 The court granted Greenpoint relief from stay at the
20 November 28, 2007 hearing, and made detailed findings of facts and
21 conclusions of law on the record. The court's finding and
22 conclusions included the following: (1) that there were multiple
23 and significant inaccuracies in the debtor's schedules and
24 statement of financial affairs; (2) that as a result of the three
25 prior bankruptcy cases filed by Charel Winston, the automatic stay
26 had prevented Greenpoint from enforcing its lien right against the
27 Property dating back to December 2006; (3) that the value of the
28 Property had depreciated since December 2006, and that during this

1 time period the obligation to Greenpoint had increased; (4) that no
2 payments had been made to Greenpoint since at least March 2006;
3 and (5) Greenpoint's interest in the Property was not adequately
4 protected.

5 Immediately after the court granted Greenpoint relief from
6 stay in the debtor's case, Alma Triche-Winston filed her chapter 11
7 case on November 28, 2007. As a result of Alma Triche-Winston's
8 chapter 11 filing, Greenpoint was again stayed from enforcing its
9 lien rights against the Property.

10 II. ANALYSIS

11 A. Legal Standards for Disqualification

12 This court has jurisdiction over the Motion pursuant to 28
13 U.S.C. sections 1334 and 157(b)(1). The Motion is a core
14 proceeding under 28 U.S.C. section (b)(2)(A) & (0); In re Betts,
15 143 B.R. 1016, 1018 (Bankr. N.D. Ill. 1992).

16 "A bankruptcy judge shall be governed by 28 U.S.C. § 455, and
17 disqualified from presiding over the proceeding or contested matter
18 in which the disqualifying circumstance arises, or, if appropriate,
19 shall be disqualified from presiding over the case." Fed. R.
20 Bankr. P. 5004(a).

21 Section 455 of Title 28 provides in part as follows:

22 (a) Any justice, judge, or magistrate of the United
23 States shall disqualify himself in any proceeding in
which his impartiality might reasonably be questioned.

24 (b) He shall also disqualify himself in the following
25 circumstances:

26 (1) Where he has a personal bias or prejudice
27 concerning a party, or personal knowledge of
disputed evidentiary facts concerning the
28 proceeding.

1 The Code of Conduct for United States Judges (the "Code of
2 Conduct") mirrors the provisions of 28 U.S.C. § 455. The Code of
3 Conduct requires that "every judicial officer must satisfy himself
4 that he is actually unbiased towards the parties in each case and
5 that his impartiality is not reasonably subject to question."
6 Bernard, 31 F.3d at 843. Under this standard, the judge must not
7 only be subjectively confident that he is unbiased; it is also
8 objectively necessary that "an informed, rational, objective
9 observer would not doubt his impartiality." Id. at 844, citing
10 United States v. Winston, 613 F.2d 221, 222 (9th Cir. 1980).
11 However, "to say that § 455(a) requires concern for appearances is
12 not to say that it requires concern for mirages." United States v.
13 El-Gabrownny, 844 F. Supp. 955, 961 (S.D.N.Y. 1994). As such,
14 recusal must be based on factors in the record and in the law. Id.
15 at 962.

16 Cases applying recusal statutes apply a presumption of
17 impartiality. E.g. In re Larson, 43 F.3d 410, 414 (8th Cir. 1994)
18 (judge presumed impartial; parties seeking recusal bear
19 "substantial burden" of proving otherwise); First Interstate Bank
20 v. Murphy, Weir & Butler, 210 F.3d 983, 987 (9th Cir. 2000)
21 ("Judicial impartiality is presumed"); In re Spirtos, 298 B.R. 425,
22 431 (Bankr. C.D. Cal. 2003) ("A judge is presumed to be qualified
23 to hear a matter and the burden is upon the moving party to prove
24 otherwise").

25 It is not a basis for disqualification that a party to a
26 proceeding disagrees with the court's ruling. The cases are
27 uniform that a "judge's adverse rulings in the course of a judicial
28 proceeding almost never constitutes a valid basis for

1 disqualification based on bias or partiality." 12 James Wm. Moore,
2 Moore's Fed. Practice § 63.21(4), at 63-39 (3d. Ed. 2006) (citing
3 cases); see also Liteky, 510 U.S. at 554-55.

4 B. Discussion

5 The Motion to Disqualify is based on the debtor's
6 dissatisfaction with the court's rulings in her case, and in her
7 daughter's case. The debtor asserts that the court improperly
8 granted Greenpoint relief from stay at the November 28, 2007
9 hearing. (Affidavit in Support of Peremptory Challenge at ¶ 4.)
10 The debtor then goes on to complain, that "on or about January 13,
11 2008 Judge Bardwil incorrectly determined that my daughter, Triche-
12 Winston's bankruptcy petition, No. 07-30155-D-7, was allegedly
13 filed in bad faith on November 28, 2007 for the purpose of delaying
14 creditors." (Affidavit in Support of Peremptory Challenge at ¶5).
15 The debtor's basis for seeking recusal or disqualification of the
16 undersigned is her disagreement and dissatisfaction with the
17 court's prior rulings; however a party's disagreement with the
18 court's rulings, is not a basis for recusal or disqualification.
19 See Liteky, supra at 554-555.

20 The undersigned is satisfied that he is actually unbiased
21 toward the debtor. Further, the undersigned cannot conclude that
22 the grounds advanced by the debtor for disqualification,
23 disagreement with prior rulings, are such that would cause a
24 reasonable person with knowledge of all the relevant facts to
25 question the impartiality of the undersigned. Accordingly, the
26 Motion to Disqualify will be denied.

27 A separate order will be entered consistent with this
28 memorandum decision.

1 Dated: MAY 29 2008

Robert S. Bardwil
Robert S. Bardwil
United States Bankruptcy Judge

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

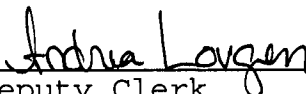
CERTIFICATE OF MAILING

I, Andrea Lovgren, in the performance of my duties as Deputy Clerk to the Honorable Robert S. Bardwil, mailed by ordinary mail a true copy of the attached document to each of the parties listed below:

Office of the US Trustee
501 "I" Street, Suite 7-500
Sacramento, CA 95814

Olga Nogues
2000 Arroyo Vista Way
El Dorado Hills, CA 95762

DATE: MAY 29 2008


Deputy Clerk